

Claimant alleges accidental injury on June 29, 1995, while working with his supervisor, Mr. Don Caywood, building a fishing dock. Claimant testified that while lifting an I-beam, he felt a twinge in his back and groaned. Thereupon the supervisor inquired and claimant advised him he had felt a twinge in his back. There was no additional conversation at that time. Claimant's supervisor, Mr. Caywood, testified that the entire fishing dock was actually completed and moved out of the plant before June 15, 1995.

He did acknowledge that he worked with claimant but denies that claimant ever mentioned a twinge in his back at any time while they were working on the dock. Mr. Caywood does acknowledge that he heard claimant groan when they were lifting the I-beam but when he inquired as to whether the claimant was okay, claimant answered that he was fine. Mr. Caywood also denied that any information was presented to Sandra Fankhauser, the city clerk, regarding any injury claimant may have suffered to his back during the year 1995.

It is significant that since 1980 claimant has suffered 17 injuries while employed with respondent for which accident reports were made to the Division of Workers Compensation.

Claimant initially sought treatment with Dr. Davidson on September 21, 1995. The evidence in the case indicates claimant first provided notice to respondent of the accident on October 12, 1995. The medical reports of Dr. Davidson indicate that claimant advised the doctor his pain had been ongoing since July and, further, indicated no history of trauma to the low back.

In proceedings under the Workers Compensation Act it is claimant's burden to establish claimant's right to an award of compensation by proving the various conditions upon which the claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

The Administrative Law Judge, in evaluating the in-court testimony of both the claimant and Mr. Caywood, has the advantage of being able to assess the demeanor and credibility of the witnesses. This does put the Administrative Law Judge in a more favorable position than that of the Appeals Board. It can be difficult to assess credibility when reading transcribed testimony. In circumstances such as this, where conflicting evidence provides more than one possible answer, the Appeals Board finds it appropriate to take into consideration the Administrative Law Judge's position in assessing the credibility of witnesses. As such, the Appeals Board finds the Order by the Administrative Law Judge denying claimant benefits after having found claimant failed to provide notice within either 10 days or 75 days of the date of accident, as is required by K.S.A. 44-520, should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated February 15, 1996, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

c: Stanley Juhnke, Hutchinson, KS
Edward D. Heath, Jr., Wichita, KS
Bruce E. Moore, Administrative Law Judge

EVERETT SMITH

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DOCKET NO. 208,000

Philip S. Harness, Director